FILE COPY

Office-Supreme Court, U.S.
FILED
MAY 21 1960
JAMES R. BROWNING, Clerk

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1959

No. 877

DOWELL, INC., and PHILLIPS PETROLEUM COMPANY,

Petitioners,

vs.

J. J. TYLER and HERMAN KING, d b a KING DRILLING COMPANY, MERCHANTS FIRE INSURANCE CORPORATION, GUARANTY MUTUAL INSURANCE COMPANY and STANDARD ACCIDENT INSURANCE COMPANY,

Respondents.

REPLY IN OPPOSITION TO PETITION FOR CERTIORARI

JOHN D. ROBB, JR.,
P. O. Box 558,
Albuquerque, New Mexico,
Attorney for Respondents.

WILLIAM A. SLOAN,
P. O. Box 558,
Albuquerque, New Mexico,
Attorney for Respondents.

ROBEY, DICKASON, SLOAN, AKIN & ROBB,
of Counsel

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 877

DOWELL, INC., and PHILLIPS PETROLEUM COMPANY,

Petitioners,

vs.

J. J. TYLER and HERMAN KING, d/b/a KING DRILLING COMPANY, MERCHANTS FIRE INSURANCE CORPORATION, GUARANTY MUTUAL INSURANCE COMPANY and STANDARD ACCIDENT INSURANCE COMPANY,

Respondents.

REPLY IN OPPOSITION TO PETITION FOR CERTIORARI

Statement

Petitioners' statement is both incomplete and inaccurate. To prevent repetition these matters will be discussed in detail under the Argument.

Reasons For Not Granting the Writ

No special or important reasons whatever are presented by Petitioners to cause this Court to exercise its discretion

in granting Certiorari. This case involves merely a negligence action, similar to thousands which crowd the dockets of Federal Courts everywhere. It presents no questions of the type which normally prompt the granting of Certiorari by this Court.

This case does not involve the substitution of Appeals Court Judges' opinions for those of the Trial Court or the mere failure of a trial judge to amplify already adequate instructions as is suggested by Petitioners at pages 4-6 of their Brief. Rather, it involves the question of whether the Court of Appeals was justified in reversing a judgment of the United States District Court because the Trial Court refused to apply the law to the facts, refused Plaintiffs' requested instructions and instead gave wholly abstract instructions.

ARGUMENT

I. Court of Appeals Was Justified and Required to Reverse the Judgment of the United States District Court for Failure Adequately to Instruct the Jury.

A. *Trial Court was Required to Relate its Statements of Law to the Facts*

The fracking operation during which the fire occurred destroying Plaintiffs' equipment was being conducted exclusively by the Defendant Dowell, Inc., without assistance or participation by the Plaintiffs (Rec. 26, 30, 92, 147, 148, 183, 184, 202). Near the end of the operation part of Dowell's equipment broke causing oil to spray out under heavy pressure from Dowell's equipment over one of its operating trucks which it had failed to shut down, thereby starting the fire (Rec. 140-146, 198, 199, 261-264, 281-285, 325). There was overwhelming evidence of Dowell's negligence, developed primarily from the testimony of Dowell's own employees, which consisted generally of the following: (1) failure to observe its own established safety practices

(Rec. 128-132, 134-137, 183), in conducting the dangerous fracking operation (Rec. 128, 135, 138, 200); (2) using equipment which, in many respects, was not safe (Rec. 160, 223, 394-396, 424-425); (3) failure, in several respects, properly to test or inspect its own equipment prior to the fracking operation (Rec. 128-132, 407, 389-393, 420); and (4) abandonment of assigned stations and failure to shut down operating equipment following the break in its equipment (Rec. 142-145, 198, 199, 261, 262, 518).

Nowhere in the Court's instructions relating to negligence did it refer to any of the facts surrounding the accident, either specifically or generally. Indeed, the Trial Court did not even instruct the jury that the Defendant's alleged negligence arose out of or was connected with a fracking operation (Rec. 601-608). These matters were covered in requested instructions submitted by Plaintiff, all of which were refused by the Trial Court (compare Rec. 577-580, 584, with 601-608). Instead, the Trial Court simply gave an abstract definition of negligence, divorced entirely from any of the facts in the case (Rec. 601-608).

The Trial Court did not read the Plaintiffs' pleadings to the jury as stated by Petitioners at page 7 of their Petition. It merely referred in its instructions to "negligence as charged in some part of the complaint" (Rec. 602). Nowhere did it state what those charges were (Rec. 601-608).

Respondents do not challenge the general rule that once a correct instruction has been given by the Court, applying the law generally to the facts, that the extent of amplification of such instructions by the Trial Court rests in its discretion. The basic fallacy, however, of Petitioners' argument herein is that it assumes that an abstract instruction constitutes a general instruction within the meaning of this rule. Unfortunately, most of the cases cited by Petitioners at pages 8-15 of their Brief do not set forth either the actual or the requested instructions. The cases

which do discuss this, however, show that in each instance the Trial Court had applied the law to the facts in at least a general fashion. In *Gibson* vs. *Lockheed Aircraft Service*, 350 U.S. 356, 100 L.Ed. 395 (1956), the facts as disclosed in the Court of Appeals opinion, 217 F. 2d 730, show that the Court had applied the law at least generally to the facts because it had granted some of the Defendants' requested instructions containing its factual theories and had, in fact, read the jury the allegations contained in the complaint.

Apart from the foregoing, the rule of law which entitles a party to instructions on his theories of the case requires those instructions to relate to his factual as well as his legal theories. Thus, in ordinary negligence actions, it is held that a party is entitled to instructions stating the different factual theories comprising his various claims of negligence (*Montgomery* vs. *Virginia Stage Lines*, (C.A.D.C. 1951), 191 F.2d 770; *Chicago & N.W. Ry. Co.* vs. *Green*, (C.A. 8th 1947), 164 F.2d 55; *Heerman* vs. *Burke*, (C.A. 8th 1959), 266 F.2d 935; *Maloney* vs. *Kaplan*, 233 N.Y. 426, 135 N.E. 838 (1922); *Southern Pac. Co.* vs. *Stephens*, 36 N.M. 10, 6 P.2d 934; *Hoyt* vs. *Central Railroad Company*, (C.A. 3d 1957), 243 F.2d 840; *Johnson* vs. *Erie Railroad Company*, (C.A. 2d 1956), 236 F.2d 352).

B. *Plaintiffs' Requested Instructions Properly Invoked the Court's Duty to give Adequate Instructions to the Jury*

Plaintiffs' requested instructions were not erroneous because they failed to include in each instruction a reiteration of Defendant's affirmative defense of contributory negligence as seems to be contended by Petitioners at pages 18 and 19 of the Petition. The issues dealing with contributory negligence were already adequately covered in other portions of the Court's instructions (Rec. 603). Plaintiffs' requested instructions (Rec. 577-580, 584) were in a form

invariably submitted by parties under our system of advocacy and Plaintiffs were not required to do Defendant's work in repeating Defendant's affirmative defenses in each requested instruction. The case of *Shell Pipe Line Company* vs. *Robinson*, cited at page 18 of the Petition (which is the only case Petitioners have cited to support their position), states that there would have been no error had the Court instructed the jury that its verdict should be for the Defendant if both parties were negligent, as was done in the instant case (Rec. 603).

Had there been any error in Plaintiffs' requested instructions, which there clearly was not, the Trial Judge still would have been required to have given at least a general instruction covering Plaintiffs' theories, although, of course, not in the same form (see *St. Paul Fire and Marine Insurance Company* vs. *Bachmann*, 285 U.S. 112, 119, 76 L.Ed. 648, 653; *Chicago & N.W. Ry. Co.* vs. *Green*, supra, and *Montgomery* vs. *Virginia Stage Lines*, supra; *Gerrard* vs. *Harvey and Newman Drilling Company*, 59 N.M. 262, 282 P.2d 1105; *Luther* vs. *Standard Conveyor Company* (Minn.), 89 N.W.2d 179, 184; *Egenberger* vs. *National Alfalfa Dehydrating and Milling Company*, 164 Neb. 704, 83 N.W.2d 523, 541).

The jury was cast adrift without any guidance by the Court's instructions relating to the very complex factual issues it was required to resolve. The jury was, in fact, confused by this lack of adequate guidance and returned several times after it had retired to ask for additional instructions, some of which related specifically to the various issues of negligence (Rec. 609, 612, 614).

II. Defendants Were Not Entitled to a Directed Verdict

Petitioners inter-relate the provisions of two separate contracts between different parties in an attempt to establish a novel "circuity of rights" theory at pages 20-26. They

overlook the fact that Appellants King and Tyler had a drilling contract with Phillips Petroleum Company to which Defendant Dowell, Inc., was not a party and which was separate and apart from the "receipt" between Phillips Petroleum Company and Defendant Dowell, Inc. (Rec. 675-677, 660-671). Likewise, Plaintiffs King and Tyler were not parties to and did not consent to the "receipt" between Phillips Petroleum Company and Defendant Dowell, Inc, which related to the fracking operation with which Plaintiffs King and Tyler had no concern (Rec. 147, 148, 202, 675-677).

Article II, paragraph 7W of the drilling contract between Plaintiffs and Phillips Petroleum Company upon which Petitioners rely requires Plaintiffs to:

> "Assume and bear all risk of accidents and damages to persons and property which may occur in the course of *Contractor's* (*Plaintiffs*) *operations hereunder* and to indemnify and hold *Owner* (Phillips Petroleum Company) harmless against or on account of all such accidents and damages." (emphasis and parentheses supplied) (Rec. 666).

The fracking operation, during which the accident occurred, formed no part of "Contractor's operations" (Rec. 17, 25, 26, 30, 92, 147, 148, 183, 184, 202, 209, 218, 219). In addition, this provision specifically limited the duty of indemnity to the "Owner" (Phillips Petroleum Company) and did not, therefore, apply so as to exonerate Dowell, Inc., a stranger, from the results of its own negligence as Petitioners contend.

Article IV, paragraph 6 of the same drilling contract, upon which Petitioners also rely, provides:

> "All risk and damage to drilling tools, machinery, appliances, derrick or equipment from whatever causes

> shall be, at all times, assumed and borne by Contractor, except, Owner agrees to reimburse Contractor actual value for loss of Contractor's drilling pipe and other sub-surface drilling tools and equipment occurring while in the performance of day work hereunder from causes other than negligence on the part of Contractor." (Rec. 669).

This is not an "indemnity" clause at all. Moreover, it relates solely to the rights of the parties to this contract *inter se*. Nowhere is any intention expressed or implied from this language to protect a stranger to the contract such as Defendant Dowell, Inc., from the results of its own negligence.

To be sure, Plaintiff King's testimony was in dispute with respect to whether or not the provisions of the drilling contract applied, as between Plaintiffs and Phillips Petroleum Company, while fracking operations were in progress (Rec. 376-378 and 380). This conflict, of course, under established rules had to be resolved in favor of Plaintiffs where, as here, Defendant Dowell, Inc., was claiming there was not substantial evidence to submit the case to the jury. In addition, the controlling fact, about which there was no dispute, was that the Plaintiffs had no intention of making Dowell, Inc., a third party beneficiary of the drilling contract (Rec. 379, 380) and no Phillips personnel ever testified that they intended to protect Dowell, Inc., by this contract.

Contracts purporting to exculpate a person from his own negligent conduct are strictly construed against such a meaning unless it is compelled by clear and explicit language (*Halliburton* vs. *Paulk*, (C.A. 5th), 180 F.2d 79, 84; *Standard* vs. *Wampler*, (C.A. 5th), 218 F.2d 768; *Buckeye* vs. *Louisville & N.R. Co.*, (C.A. 6th), 24 F.2d 347, 348; *Westinghouse Elec. El. Co.* vs. *LaSalle*, 395 Ill. 429, 70 N.E.2d

604, 607; *Donut Machine Corporation* vs. *Bibbey*; (C.A. 1st), 65 F.2d 634; *Fairfax Gas and Supply* vs. *Hadary*, (C.A. 4th), 151 F.2d 939, 940; *Sinclair* vs. *Thornley*, (C.A. 10th), 127 F.2d 128, 133; *Standard Insurance Company of N.Y.* vs. *Ashland Oil and Refinery Company*, (C.A. 10th), 186 F.2d 44; *Mohawk Drilling Company* vs. *McCullough Tool Company*, (C.A. 10th 1959), 271 F.2d 627).

The cases cited by Petitioners at pages 22-24 of their Petition are readily distinguishable in that in each of them there was a clearly expressed intention (a) that the parties intended to create a right of indemnity, and (b) that such right was to run in favor of strangers to the contract.

III. Additional Grounds Existed for Reversing the Judgment of the United States District Court Apart from its Failure Adequately to Instruct the Jury.

Petitioners at page 3 of their Petition baldly assert that this case was reversed by the Court of Appeals solely because of the Trial Court's errors in failing adequately to instruct the jury. Therefore, they have ignored all the other grounds which also warranted and required reversal. The Court of Appeals indicated that the Trial Court probably committed reversible error in refusing Plaintiffs' rights to impeach Defendant Dowell's station manager (Petition for Certiorari, pages 43, 44). In addition, since it had determined to reverse the case on the basis of the Court's instructions, the Court of Appeals declined to pass upon certain other decisions of the Trial Court the validity of which is questioned. Any of these erroneous rulings would themselves have required reversal had the Court of Appeals not reversed on the instruction and impeachment points (see discussion and authorities set forth in Court of Appeals Opinion reproduced in Petition for Certiorari, pages 40-44).

IV. Conclusion

The Record undeniably shows that a gross miscarriage of justice resulted at the trial from a Defendant's verdict because the facts unerringly disclosed that Plaintiffs' damages were caused by Defendant's negligence. This unfair and bizarre result is directly traceable to the several and independent errors committed by the Trail Court. Petitioners have failed to present any special or important questions justifying the granting of Certiorari. Respondents respectfully request that the Petition be denied.

JOHN D. ROBB,
WILLIAM A. SLOAN.

RODEY, DICKASON, SLOAN, AKIN & ROBB.
of Counsel.

(468-9)